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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MIGUEL ANGEL MORENO, Defendant and Appellant.	H042132 (Santa Clara County Super. Ct. No. C149564)

Defendant Miguel Angel Moreno appeals from an order denying his petition for resentencing pursuant to Proposition 47. (Pen. Code, § 1170.18, subd. (a).) On appeal, defendant asserts that the trial court erred in ruling that he was ineligible for Proposition 47 relief.

STATEMENT OF THE CASE

As the result of defendant's theft of a 1990 Honda Accord in August 2014, defendant was charged with one count of vehicle theft with a prior with a prior conviction (Veh. Code, § 10851, subd. (a), Pen. Code, § 666.5); buying or receiving a stolen vehicle with a prior conviction (Pen. Code, §§ 496d & 666.5); attempted burglary of a vehicle (Pen. Code, §§ 664 & 459-460, subd. (b)); possession of burglary tools (Pen. Code, § 466); and possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)).

On September 26, 2014, he pleaded no contest to all of the charges with the exception of buying or receiving a stolen vehicle, and possession of burglary tools, which were dismissed. Defendant was sentenced to three years in state prison for the vehicle theft with a prior. The court also sentenced defendant to one year for attempted burglary of a vehicle and two years for possession of a controlled substance, to run concurrent to the three-year sentence for the vehicle theft with a prior.

In February 2015, defendant filed a petition for resentencing for his vehicle theft with a prior and possession of a controlled substance convictions pursuant to Proposition 47. With regard to the vehicle theft with a prior conviction, defendant argued that, because the 1990 Honda Accord that he stole was worth less than $950, his crime was a petty theft, and should be treated as a misdemeanor.

The court granted defendant's petition as to the possession of a controlled substance conviction, and resentenced defendant to three years in county jail, with two years to be spent in custody. The court denied defendant's petition as to the vehicle theft with a prior, finding that violations of Vehicle Code sections 11851 and 666.5[1] are not eligible for resentencing under Proposition 47.

Defendant filed a notice of appeal on March 13, 2015.

DISCUSSION

Defendant argues that the trial court erred in denying his petition to resentence his vehicle theft with a prior conviction as a misdemeanor pursuant to Proposition 47. He argues that voters intended that the crime of theft of a vehicle valued at $950 or less be included in the sentencing reforms of Proposition 47. In addition, defendant asserts that the court's denial of his Proposition 47 petition violated his right to equal protection under both the California Constitution and the Fourteenth Amendment.

[1] All further unspecified statutory references are to the Vehicle Code.

On November 4, 2014, the voters enacted Proposition 47, the Safe Neighborhoods and Schools Act. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) Proposition 47 "reduced the penalties for a number of offenses." (*People v. Sherow* (2015) 239 Cal.App.4th 875, 879 (*Sherow*)). Penal Code section 1170.18, which was also added by Proposition 47, "creates a process where persons previously convicted of crimes as felonies, which would be misdemeanors under the new definitions in Proposition 47, may petition for resentencing." (*Sherow, supra,* 239 Cal.App.4th at p. 879.) Penal Code section 1170.18, subdivision (a) specifies that a person may petition for resentencing in accordance with Penal Code section 490.2.

"[A] petitioner for resentencing under Proposition 47 must establish his or her eligibility for such resentencing." (*Sherow, supra,* 239 Cal.App.4th at p. 878.) The petitioner for resentencing has the "initial burden of proof" to "establish the facts[] upon which his or her eligibility is based." (*Id.* at p. 880.) If the crime under consideration is a theft offense, " 'the petitioner will have the burden of proving the value of the property did not exceed $950.' [Citation.]" (*Id.* at p. 879.) In making such a showing, "[a] proper petition could certainly contain at least [the petitioner's] testimony about the nature of the items taken." (*Id.* at p. 880.) If the petitioner makes a sufficient showing, the trial court "can take such action as appropriate to grant the petition or permit further factual determination." (*Ibid*.)

The question of whether defendant is eligible for resentencing is dependent upon whether defendant would have been guilty of a misdemeanor if Proposition 47 had been in effect in August of 2014 when he stole the 1990 Honda Accord. Penal Code section 490.2 provides, in part: "Notwithstanding [Penal Code] Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a

misdemeanor . . . ." (Pen.Code, § 490.2, subd. (a).) Nothing in the plain language of the statute—which covers "*any property* by theft"—excludes the theft of a vehicle. Thus, if defendant stole a vehicle with a value of $950 or less, that offense would have been a misdemeanor under Section 490.2.

While Proposition 47 does not list section 10851 by name or number, the plain language of Penal Code section 490.2 unambiguously includes conduct prohibited under section 10851. Section 10851 punishes "[a]ny person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle . . . ." (Veh Code, § 10851, subd. (a).) Nothing in this statute addresses the value of vehicles that are taken or driven. Thus, section 10851 includes the taking of a vehicle worth $950 or less by a person who intends to permanently deprive the owner of his or her title to or possession of the vehicle. But, "[n]otwithstanding . . . any other provision of law defining grand theft," Penal Code section 490.2 now punishes the theft of a vehicle worth $950 or less as a misdemeanor.

Section 10851 prohibits the driving or taking of a vehicle "with intent either to permanently or temporarily deprive the owner" of possession. (§ 10851, subd. (a).) Our California Supreme has held, "[Section 10851] defines the crime of unlawful driving *or* taking of a vehicle. Unlawfully *taking* a vehicle with the intent to permanently deprive the owner of possession is a form of theft, and the taking may be accomplished by driving the vehicle away. For this reason, a defendant convicted under Section 10851(a) of unlawfully *taking* a vehicle with the intent to permanently deprive the owner of possession has suffered a theft conviction . . . ." (*People v. Garza* (2005) 35 Cal.4th 866, 871, original italics.) It follows that if a person convicted of violating section 10851 took a vehicle worth $950 or less with the intent to permanently deprive the owner of its

possession, such conduct is now petty theft, and the prior conviction is eligible for resentencing as a misdemeanor under Proposition 47.

Our appellate courts are in disagreement over the issue of whether theft convictions under section 10851 can be eligible for Proposition 47 sentencing, and we have not yet received guidance from the California Supreme Court. (See *People v. Page* (2015) 241 Cal.App.4th 714, review granted Jan. 27, 2016, S230793; *People v. Haywood* (2015) 243 Cal.App.4th 515, review granted Mar. 9, 2016, S232250; *People v. Solis* (2016) 245 Cal.App.4th 1099, review granted Jun. 8, 2016, S234150; *People v. Ortiz* (2016) 243 Cal.App.4th 854, review granted Mar. 16, 2016, S232344; *People v. Gomez* (2016) 243 Cal.App.4th 319, rehg. granted Jan. 11, 2016, S233849, subsequent opn. not certified for pub. Mar. 15, 2016, review granted May 25, 2016 [2009 WL2581321]; see also, *People v. Orozco* (Aug. 8, 2008, D067313) rehg. granted Feb. 8, 2016, subsequent opn. not certified for pub. May 25, 2016, petn. for review filed July 1, 2016 [2008 WL3198770]).) Until we receive guidance from the Supreme Court, we will follow our reasoning in previous cases, and hold that a conviction of theft of a vehicle valued at under $950 under Section 10851 is eligible for resentencing under Proposition 47.

Here, defendant was convicted of a violation of section 10851 and Penal Code section 666.5 for the theft of the 1990 Honda Accord with a prior vehicle theft conviction. In relevant part, Penal Code section 666.5 provides: "Every person who, having been previously convicted of a felony in violation of Section 10851 of the Vehicle Code, or . . . a felony violation of [Penal Code] Section 496d regardless of whether or not the person actually served a prior prison term for those offenses, is subsequently convicted of any of these offenses shall be punished by imprisonment pursuant to subdivision (h) of [Penal Code] Section 1170 for two, three, or four years, or a fine of ten thousand dollars ($10,000), or both the fine and imprisonment." The Attorney General

argues that the recidivist punishment required in Penal Code section 666.5 precludes resentencing under Proposition 47. However, Penal Code section 666.5 mandates felony punishment for those defendants who suffer a subsequent *felony* violation of section 10851. If a section 10851 violation is characterized as a misdemeanor because the value of the stolen vehicle is $950 or less, then its sentence cannot be enhanced by the recidivist punishment provisions in Penal Code section 666.5. Here, regardless of the Penal Code section 666.5 allegation, the question still remains whether defendant's vehicle theft conviction qualifies as a misdemeanor.

Here, defendant's argument that he should be resentenced is premised on the assumption that the 1990 Honda Accord that he stole in 2014 was valued at $950. A bare assertion regarding the vehicle's value, without any evidence supporting it, is insufficient to establish the vehicle's value. (See *Sherow, supra,* 239 Cal.App.4th at p. 880 [a proper resentencing petition could contain "at least" the petitioner's testimony regarding the stolen item].) The value of a stolen item is measured by the fair market value of the item at the time and place of its theft. (*People v. Pena* (1977) 68 Cal.App.3d 100, 102-104; Pen. Code § 484, subd. (a); CALCRIM No. 1801.) There is nothing in the record to show that at the time of the theft, the car was worth $950 or less.

Because the record does not show that the 1990 Honda Accord was worth $950 or less, defendant has failed to demonstrate error, and we must affirm.[2] We will affirm without prejudice. We note that a petition containing a declaration regarding the fair market value of the vehicle could be sufficient to set the matter for hearing. (See *Sherow, supra,* 239 Cal.App.4th at p. 880 [a proper resentencing petition "could certainly contain at least" the petitioner's testimony about the stolen item, and on a sufficient showing the

[2] Given this result, we need not address defendant's argument that it would violate equal protection principles to treat his conduct differently under section 10851 as compared with Penal Code section 490.2.

trial court "can take such action as appropriate to grant the petition or permit further factual determination"].)

DISPOSITION

The order denying defendant's Proposition 47 petition is affirmed without prejudice to subsequent consideration of a petition that demonstrates that the stolen vehicle was valued at $950 or less.

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RUSHING, P.J.

I CONCUR:

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PREMO, J.

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GROVER, J., Dissenting

As the majority acknowledges, our Supreme Court is currently considering whether vehicle theft under Vehicle Code section 10851 and recidivist vehicle theft under Penal Code section 666.5 are subject to redesignation as misdemeanors under Proposition 47.[3] As defendant was convicted of vehicle theft with a prior conviction (Veh. Code § 10851, subd. (a); Pen. Code § 666.5), I limit my analysis to that context. The language and structure of Proposition 47 and the statutes at issue here persuade me that recidivist vehicle theft under section 666.5 does not fall within the rubric of Proposition 47. I would affirm the order denying defendant's resentencing petition with prejudice.

Proposition 47, an initiative measure known as the Safe Neighborhoods and Schools Act (the Act), reduced certain theft offenses from wobblers to misdemeanors by amending particular Penal Code sections, specifically section 473 (forgery), section 476a (writing bad checks), section 496 (receiving stolen property), and section 666 (petty theft with a prior). The Act created the offense of shoplifting by added new Penal Code section 459.5, and it added new section 490.2, titled "Petty theft; punishment of certain repeat offenders." That section states, "Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor" unless the offender has disqualifying prior convictions, in which case the offense is a wobbler. (§ 490.2, subd. (a).)

New Penal Code section 1170.18, also added by Proposition 47, provides a mechanism for a person convicted of a "felony or felonies who would have been guilty of

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[3] References to section 10851 are to the Vehicle Code. All other undesignated references are to the Penal Code.

a misdemeanor under [the Act] … had [the Act] been in effect at the time of the offense," to be resentenced as a misdemeanant if the person is currently serving a sentence for the conviction. (§ 1170.18, subd. (a).) Section 1170.18, subdivision (a) allows a person to "petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with [sections of the Health and Safety Code], or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act." (*Id*.) Section 1170.18, subdivision (b) directs the trial court to resentence a person "to a misdemeanor pursuant to [Health and Safety Code sections], or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, [as] those sections have been amended or added by this act," unless the court determines that resentencing would pose an unreasonable risk of danger to public safety. (§ 1170.18, subd. (b).)

Defendant was convicted of a felony violation of section 10851 as a recidivist, making him ineligible for resentencing under section 1170.18. Section 10851, subdivision (e) provides that a person who has been convicted of a previous felony violation of section 10851 "is punishable as set forth in Section 666.5 of the Penal Code." Section 666.5 provides: "Every person who, having been previously convicted of a felony violation of Section 10851 of the Vehicle Code" or felony offenses involving vehicle, trailer, construction equipment, or vessel theft, "is subsequently convicted of any of these offenses shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or four years, or a fine of ten thousand dollars ($10,000), or both the fine and imprisonment." (§ 666.5, subd. (a).) Neither section 10851 nor section 666.5 is among those specifically amended by Proposition 47, despite the voters' opportunity to do so.

Penal Code section 666.5 requires felony punishment for recidivist offenders who violate Vehicle Code section 10851. When a defendant is charged as a recidivist under

section 666.5, the offense is classified as a felony by the punishment pronounced, and the trial court lacks the discretion to classify the wobbler offense that it would otherwise have when a defendant is charged under section 10851 without a prior conviction alleged. (*People v. Park* (2013) 56 Cal.4th 782, 790 [trial court has discretion to classify a wobbler as a felony or misdemeanor].) I disagree with the majority that the statutory scheme would allow for felony punishment only if the current offense involved theft of a vehicle valued over $950. Under section 666.5, subdivision (a), the second or subsequent taking of a vehicle under section 10851 is designated a felony regardless of the value of the vehicle involved. Because defendant would not have been guilty of a misdemeanor "had [the Act] been in effect at the time of the offense" (§ 1170.18, subd. (a)), I respectfully conclude that he is not eligible for resentencing under Proposition 47.

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Grover, J.